IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-671

EMMA TURNER, ET AL, *Petitioners*

v.

MARION COUNTY, TEXAS, *Respondent*

On Petition For Review Of An Unpublished Judgment Of The Sixth Judicial Court Of Civil Appeals Of Texas ~~Affirmed By The Supreme Court Of Texas~~

PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Petitioner

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NAMES OF ALL PARTIES

A complete list of the names of all parties to this proceeding is as follows:

Emma L. Turner
Ricky Turner
Debra Gale Turner
Ernest Vaughn Turner
Darren Turner
Christy Turner
Marion County, Texas

REQUEST FOR ORAL ARGUMENT

Petitioner requests oral argument in order to show the important precedential value of the Court's ruling. In affirming the Sixth Judicial Court of Civil Appeals of Texas, the Supreme Court of Texas further expands the racial discrimination practices of the State of Texas and/or its governmental agencies toward its citizens.

SUBJECT INDEX

LIST OF AUTHORITIES

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JURISDICTION

The jurisdiction of this Court is invoked under the Fifth Amendment to the Constitution of the United States, the Fourteenth Amendment of the Constitution of the United States, 28 U.S.C. Section 1224(1).

CITATION OF OPINIONS

Only one unpublished opinion is stated herein.

QUESTIONS PRESENTED

1. Whether state due process is essentially equivalent to Federal due process; if so, how can the State Trial Court avoid being bound by these limitations in its oral pronouncements in denying a party-citizen a request for due process against the awesome State party litigant.

2. Whether citizen petitioner has as a matter of right a right to an unbaised and unprejudicial jury under the Fourteenth Amendment when the lawsuit is against a state governmental body.

3. Whether or not the Federal Rules of Safety on the job apply when the employer is a state governmental body using Federal-State revenue sharing funds.

4. Whether or not a State Trial Court is under the limitations as guaranteed by the Fourteenth Amendment and must apply these principles even though a state governmental agency is a party litigant.

5. Whether or not a State can completely deny a citizen litigant due process and equal protection when the opposing party is a state agency.

6. Whether or not the Federal Rules of Job Safety can be construed as being the same as those that should be used by state agencies on Federal revenue sharing projects.

7. Whether a Chief Judge should disqualify himself when he has a direct or indirect interest in the outcome of a law suit.

STATEMENT

This is a non-subscriber workman's Compensation cause in which a state agency, Marion County, Texas is the Respondent. Emma Turner, Petitioner and as next friend for: 1. Debra Turner, 2. Ernest Turner, 3. Ricky Turner, 4. Darren Turner, and 5. Christy Turner.

Ernest Turner was killed when a tractor turned over on him crushing and killing him while he was in the scope of his employment for Marion County, Texas. There were no witnesses to the accident. Petitioner took depositions, filed admissions and attempted to litigate the matter.

Petitioner first attempted to litigate through Summary Judgment as prescribed by Rule 166A of the Rules of Civil Procedure of Texas and adopted from Rule 56 of the Federal Rules of Civil Procedure. Citing *Carrothers v. Stanolind Oil and Gas Company*, 134 F. Supp. 191 which was denied. Petitioner then attempted to exercise her right of trial by jury and was denied.

REASONS FOR GRANTING THE WRIT

From the very outset this Petitioner was denied due process and equal protection of the law.

The first attempt to enter into litigation by Petitioner was through the office of Summary Judgment as provided by both the State and Federal Rules. This motion was denied, even though the matter was properly before the Court.

During Jury Voir Dire a member of the selected jury panel voiced her prejudices toward the attorneys for Pe-

titioner. This juror stated that she had positively seen this attorney carrying a gun in open court when she had not. A strenuous objection to this jury panel was entered and overruled. With a biased juror Petitioner's right to due process is seriously threatened.

From the tenor that has now been set the trial court has begun the systematic process of denying Petitioner due process and equal protection. Petitioner now must proceed under extraordinary prejudicial circumstances. The jurors are reminded that there is no insurance but taxpayers must pay the cost if the Petitioner is given a justiciable finding.

Because the trial court has shown that the Respondent has the better bargaining power and refused to protect Petitioner through and by the laws of the State and United States, Petitioner filed a Motion asking the Court to affirmatively grant this Petitioner protection under the laws of the State as provided by statute and was affirmatively denied due process and equal protection. (See Rule 1 T.R.C.P.)

During the course of the trial fourteen witnesses were called by the Petitioner, none of which was allowed to testify in the capacity in which they were called. On each occasion an attempt was made to inform the Court of the purpose of each witness.

An example of the situation: Lanny Grubbs called in a three-fold purpose

1. He was last to see decedent in life and first in death

2. worked for County using instrumentality

3. worked for International Paper Co. using like or similar heavy equipment

At no time was Petitioner allowed due process with this witness but yet the Respondent was allowed to ask detrimental leading questions in which he gave his own answers, and was absolutely allowed to testify. The Respondent was allowed procedural latitude that far exceeds those as prescirbed by established principles of State and Federal Law.

Petitioner was not allowed to put before the jury any evidence to explain the probability of the cause of the accident. The petitioner made a bill of exception showing probability but was denied jury access.

Even to the very last Petitioner was completely denied due process as the State Trial Court prepared the Charge, over the objections of Petitioner the State Trial Court submitted a Charge to the Jury without the use of the established principle of law Preponderance of Evidence as a part of the questions propounded to the jury.

Petitioner submitted special issues and jury charges, none of which were acceptable to the trial court.

From the beginning to end the unfair bargaining power of the State was intensely felt by the black party petitioner. The Petitioner was never allowed the right of due process and/or equal protection of the law.

The constitutional guarantees of the United States have met with serious deterioration when it is applied to a black citizen as opposed to State party litigants in Texas courts.

The Petitioner further complained to the State's Appeals Court without a remedy. This Court refused to go on record and gave no published opinion as to Petitioner's plight. The Court gave erroneous statements as to the finding of evidence—as opposed to a no evidence finding.

Petitioner complains of the Chief Justice sitting at Texarkana, Texas on the Sixth Judicial Court, saying this Justice owns property in the County of Marion and therefore has a vested interest in the outcome of this law suit and should have on his own Motion disqualified himself. Instead, he wrote the unpublished opinion in this law suit.

CONCLUSION

In conclusion Petitioner prays that a writ of certiorari be granted and that she be allowed oral argument in support of her request.

Respectfully submitted,

TITUS EDWARDS
MARY EDWARDS
3910 Fernwood
Houston, Texas 77021
Attorneys for Petitioner

Of Counsel:
ROBERSON KING

Date _____

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing instrument has been served on the County of Marion, Texas by delivering same to:

Tony Hileman
Jefferson, Texas
Marion County, Texas

TITUS EDWARDS
MARY EDWARDS
Counsel for Petitioner

APPENDIX

COURT OF CIVIL APPEALS
Sixth District
Texarkana, Texas

No. 8629

Emma Turner, Et Al, Appellants

v.

County of Marion, State of Texas, Appellee

Appealed from the 115th Judicial District Court
of Marion County, Texas

Ernest Turner was killed while working as an earth moving machine operator for Marion County, Texas. No one witnessed the accident. Mr. Turner was found crushed under the machine which had overturned. The widow and children brought suit for damages for wrongful death, alleging that the accident was due to the county's negligence in failing to provide the deceased with safe working conditions or a safe place to work. The jury answered the negligence issues in the county's favor, and a take nothing judgment was entered. The parties will be referred to as in the trial court.

The appeal raises five points of error. The first asserts that the trial judge erred in overruling plaintiffs' special exceptions to portions of the defendant's pleadings which alleged that Mr. Turner was guilty of contributory negligence. It is contended that because the defendant judicially admitted there was no witness to the accident,

it should not have been permitted to plead or attempt to prove contributory negligence on the part of the deceased.

Proof of a fact does not depend upon eye witness testimony. Contributory negligence, just as any other fact, may be proved by circumstantial evidence. 40 Tex. Jur. 2d, Rev., Part 2, Negligence, Sec. 150, p. 431. The trial judge properly refused to strike the pleadings because, even in the absence of an eye witness, it might have been possible to prove the contributory negligence allegations by circumstantial evidence. Unless there was a showing of bad faith on the defendant's part in making the allegations, it had the right to plead and attempt to prove contributory negligence. 2 McDonald's, Texas Civil Practice, Sec. 5.10, p. 31.

The second point of error urges that the trial judge erred in refusing to submit plaintiffs' requested issues supporting the theory of res ipsa loquitur.

The doctrine of res ipsa loquitur, meaning the thing speaks for itself, is a qualification of the general rule that negligence may not be inferred but must be affirmatively proved. It is not a rule of substantive law, but is a rule of circumstantial evidence whereby negligence may be inferred from the mere fact that an event occurred. For the doctrine to apply, the character of the accident must be such that it would not ordinarily occur in the absence of negligence, and the instrumentality causing the injury must be shown to have been under the management and control of the defendant at the time the alleged negligent act occurred. *Mobil Chemical Company v. Bell,* 517 S.W.2d 245 (Tex. 1974). The plaintiffs here did not bring themselves within the rule because

the undisputed evidence showed that at the time of the accident, the instrumentality causing the death—the earth moving vehicle—was in the exclusive possession, management and control of the deceased, not the defendant. See *Johnson v. Texas & Pacific Ry. Co.,* 117 S.W.2d 864 (Tex. Civ. App. Eastland 1938, writ dism'd); *Texas & Pacific Coal Co. v. Kowsikowski,* 103 Tex. 173, 125 S.W. 3 (1910). If it be considered that the alleged negligent act of the defendant was the failure to provide the vehicle with safety equipment, or the failure to provide the deceased with a helper, rather than some act occurring at the time of the accident, the plaintiffs are still defeated because the jury found against them on their requested issues of unsafe working conditions and unsafe place to work. Furthermore, the rule of res ipsa loquitur has no application when the facts shown are as consistent with the hypothesis that the injury was caused by the negligence of the deceased, or by the negligence of the deceased and the defendant, as it is with the hypothesis that it was caused solely by the negligence of the defendant. *Blassingame v. Halliburton Oil Well Cementing Co.,* 317 S.W.2d 111 (Tex. Civ. App. Eastland 1958, no writ); *Kimmey v. General Motors Corp.,* 262 S.W.2d 530 (Tex. Civ. App. Galveston 1953, writ ref'd n.r.e.); 40 Tex. Jur. 2d, Rev., Part 2, Negligence, Sec. 141, p. 404. Plaintiffs were not harmed in any event. If they had been entitled to rely upon the rule it would not have been proper for the trial court to submit their requested special issues on the "control" and "nature of the accident" questions. Rather, if in the trial judge's opinion there is probative evidence tending to establish those factors, he should submit only the ultimate issue of negligence. *Mobil Chemical Com-*

pany v. Bell, supra. The court submitted plaintiffs' requested ultimate issues on negligence but the jury found those issues against them. Res ipsa loquitur is of no help to them in that situation. The doctrine does not raise a presumption of evidence or eliminate the necessity for a finding of negligence. It merely puts the plaintiff in the position of having *produced* some evidence of negligence, thus allowing, but not compelling, the jury to find negligence. *Mobil Chemical Company v. Bell,* supra.

It is next asserted that the trial judge erred in failing to submit to the jury plaintiffs' requested special issues on safe working conditions and to instruct them that the defendant had a non-delegable duty to provide the deceased with a safe place to work. The contention will be overrueld. Plaintiffs' requested issue on safe working conditions was submitted in substantially correct form and the court gave substantially correct definitions of the terms "reasaonably safe place to work" and "reasonably safe working conditions." There was no need to instruct the jury concerning any non-delegable duty. There was no evidence or contention that the defendant had attempted to delegate to anyone else its duty to provide a safe place to work or safe working conditions for the deceased.

Point of Error No. Four argues that plaintiffs were entitled to judgment notwithstanding the verdict. The basis of the argument is that because the defendant failed to put forth any evidence, the jury was required to accept plaintiffs' version of the facts and find the issues in their favor. The contention is without merit. Plaintiffs simply failed to carry their burden of proof on the issues of negligence and proximate cause. The

fact that it was undisputed that defendant failed to provide the earth moving machine with a protective roll bar and safety belts does not establish as a matter of law that such failure was negligence, or if negligence, that it was a proximate cause of the accident.

The last contention on appeal urges that the trial judge erred in overrulling plaintiffs' "Motion For The Trial To Proceed In An Orderly Manner." The gist of the motion was that defense counsel should not be allowed to ask leading questions of the witness Grubbs, and that plaintiffs should have been allowed to produce certain evidence for a bill of exceptions without interference from defense counsel's objections. These contentions are overruled. Leading questions to Mr. Grubbs were proper because he was on cross-examination. Plaintiffs were not denied the right to perfect their bill of exceptions. The trial judge did announce that he was sustaining defense counsel's objections to the testimony, but plaintiffs' counsel was then allowed to adduce the excluded evidence on her bill of exceptions for the record. No point has been raised as to the exclusion of the evidence from the jury's consideration.

All of plaintiffs' points of error have been carefully considered and are respectfully overruled.

The judgment of the trial court is affirmed.

William J. Cornelius
Chief Justice

March 6, 1979

Filed March 6, 1979

(Not to be published—Rule 452, Tex. R. Civ. P.)

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

June 27, 1979

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of TURNER ET AL. v. COUNTY OF MARION, No. B-8400 was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

July 25, 1979

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of EMMA TURNER ET AL v. COUNTY OF MARION, STATE OF TEXAS, B-8400, was this day OVERRULED.

Very truly yours,

GARSON R. JACKSON, Clerk